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IN THE

# Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

*Petitioners*,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

A. The first question presented by our *certiorari* petition is whether Executive Order No. 13202 is, as we contend, "regulatory" government procurement action that is subject to National Labor Relations Act ("NLRA") preemption analysis or, as the D.C. Circuit held, proprietary action that is immune from such analysis.

The Government's "Brief for the Respondents In Opposition" describes such a different Executive Order from the Order challenged in this case and describes and defends such a different D.C. Circuit decision from the decision below as to be an opposition to the grant of our *certiorari* petition in title only.

1. From the outset, the Government mischaracterizes the Executive Order as an Order that embodies "the President's decision not to require or forbid project labor agreements for federal or federally funded construction contracts." Gov. Br. at (I). Had the Order stated such an unexceptionable Executive policy—one consistent with Congress' policy, as stated in the NLRA, which authorizes construction managers and construction unions to negotiate project labor agreements – there would have been no lawsuit in the first place. But what the Executive Order does is "establish [as] the policy of the Government," Pet. App. 2a, a policy contrary to the NLRA's, by flatly prohibiting the negotiation of project-wide prehire collective bargaining agreements that bind all contractors and subcontractors on federal and federally assisted projects.[1]

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[1] Section 1 of the Executive Order directs federal agencies to ensure that neither the agency nor its construction manager shall include in its "bid specifications, project agreements, or other controlling documents" for a construction project the kind of clause expressly authorized by NLRA § 8(e), one that "require[s] . . . contractors [and] subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction projects(s)." Pet. App.

As the Government would have it, the project labor agreements authorized by the NLRA—and left untouched by the Executive Order—are simple "pre-hire collective bargaining agreement[s] that [are] negotiated between *a contractor* on a construction project and *one or more unions*." Gov. Br. at 2 (emphasis added). But an NLRA-authorized "project labor agreement" is, instead, a comprehensive prehire collective bargaining agreement, binding on all the contractors and subcontractors later hired onto the project, that is negotiated by a construction manager or general contractor that has the authority to determine the labor relations terms for the entire project, and the unions representing all of the trades that will work under the construction manager/general contractor's control. And, it is precisely such agreements that the Executive Order bans.[2]

2. The Government then seeks to leverage its mischaracterization of the Executive Order into a mischaracterization of our position and of the D.C. Circuit's decision.

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74a. Section 3 requires federal contracting agencies to impose the same restrictions on recipients of federal assistance and their construction managers. *Id.* at 75a.

[2] The Government's claim that the Executive Order "specifically provides that contractors and subcontractors on federal and federally funded construction projects are not prevented from voluntarily entering into PLAs with labor organizations," Gov. Br. at 3, *citing* E.O. 13202 § 1(c), Pet. App. 75a, is thus a play on words that denies the term "PLA" its meaning. As we pointed out in the *certiorari* petition (at 7-8), the "permission" § 1(c) of the Order grants contractors and subcontractors to devise and implement their own labor relations policies *after* the bids for contracts and subcontracts are awarded and without any assistance from a construction manager, is not the equivalent of—nor does it even approximate—the permission the NLRA grants to construction managers/general contractors to negotiate prehire collective bargaining agreements prior to the bid awards, which are binding on all the contractors and subcontractors who later receive those bid awards.

As the Government puts it,

> Petitioners do not dispute that the President's decision neither to require nor to prohibit a PLA on a single federal (or federally funded) construction project is proprietary, and thus does not implicate principles of NLRA preemption. Petitioners contend, however, that the same decision . . . applicable to all such projects, is transformed into a regulatory one. [Gov. Br. 8.]

With that headway, the Government proceeds to defend what it calls "[t]he court of appeals' contrary holding." *Id.*

To begin, we did not opine, one way or another, on whether the "President's decision neither to require nor to prohibit a PLA on a single federal (or federally funded) construction project is proprietary"—and then argue that the "same decision . . . applicable to all such projects is transformed into a regulatory one"—for the commonsense reason that Executive Order No. 13202 does not embody any such decision.

Rather, as we summarized it in the *certiorari* petition, our proprietary/regulatory dichotomy argument—which rests on the analysis in *Building and Construction Trades Council v. Associated Builders and Contractors of Mass./R.I.*, 507 U.S. 218, 228-30 (1991) ("*Boston Harbor*")—is this:

> [A] purchaser participating in the market who demands that its suppliers conduct their affairs in a specified manner (i) acts as a "regulator" when its demand is based on the purchaser's "policy concerns"—in this context, its labor policy concerns—and is to further its interest in effectuating its policy preferences; and (ii) acts as a "typical proprietor" when its demand is based solely on its "profit motive" interest—its interest in purchasing a good or service efficiently and effectively—and not at all on its regulatory interest "in setting policy." The most essential point is that when government procurement action "set[s] policy," it has a hallmark of government regulatory action, and that when

> government procurement action "set[s] policy" in an area where Congress has set policy through an exclusive regulatory statute, it has a hallmark of government action that requires preemption analysis and review—and that cannot be categorically immunized from such analysis and review. [Pet. at 23.]

On the pretense that we argued something quite different, the Government's Brief offers no response to that argument.

Equally to the point, the D.C. Circuit's holding is not one "contrary" to the simplistic argument the Government wrongly attributes to us. It is, instead, the following:

> A condition that the Government imposes in awarding a contract or in funding a project is regulatory *only* when, as the Supreme Court explained in *Boston Harbor*, it "addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." 507 U.S. at 228-229. Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the government." Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory." [Pet. App. 13a (emphasis added).]

As we pointed out in the *certiorari* petition (at 24-26), this holding is wrong in at least three regards. *First*, it rests on a misreading of the passage from *Boston Harbor* that the D.C. Circuit quotes. *Second*, it distorts the essential point of *Boston Harbor*—that government procurement action is proprietary when the government "acts as a market participant with no interest in setting policy," 507 U.S. at 229—into a point, contrary to the basic understanding of government regulation, that government procurement action is proprietary when the government acts *with an interest in setting policy*

for the class of private entities providing goods/services for the government, while they are providing those goods/services. And *third,* it takes the proprietary/regulatory dichotomy—a means of insulating from unwarranted preemption attacks government procurement action that is focused on the government's proprietary interests—and transforms that dichotomy into a means of insulating from preemption scrutiny government procurement action that is, in reality, policymaking in areas in which Congress has already enacted legislative policy.

Again, on the pretense that the D.C. Circuit's holding is something different than it is, the Government's brief does nothing to justify the holding as actually stated by that court or to respond to our showing that the Court of Appeals' elaboration of the proprietary/regulatory dichotomy is unsound in every particular.

3. The Government's denial that the D.C. Circuit's decision here is in conflict with the Ninth Circuit's decision in *Dillingham Const. N.A. Inc. v. County of Sonoma,* 190 F.3d 1034 (9th Cir. 1999), is also bottomed on mischaracterizing the decisions. According to the Government, the two decisions turn not on contrary analyses but on contrary factual findings. By the Government's account, the D.C. Circuit's proprietary action conclusion rests on a factual finding that the Executive Order's ban on PLAs was "designed to . . . 'ensur[e] the most effective use of [government] funds,'" while the *Dillingham* court's regulatory action conclusion rests on a factual finding that California's application of apprenticeship standards to public contractors was designed not to ensure the most effective use of government funds, but to accomplish a different result. Gov. Br. at 12. Neither of these decisions, however, hinged on such factual findings.

As we have noted, the D.C. Circuit's proprietary action conclusion rests on that court's novel elaboration of the proprietary/regulatory dichotomy: a procurement action is

regulatory "only when . . . it address[es] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." Pet. App. 13a (internal quotations omitted). On this legal rule—and not on any finding that the Executive Order was designed to ensure the most effective use of government funds—the D.C. Circuit concluded that "[b]ecause the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'" *Id.*[3]

The Ninth Circuit, by contrast, adhering to *Boston Harbor's* teachings, rejected California's market participant argument in these terms:

> The . . . law applies uniformly to all public works contracts executed in the State of California and is a mechanism through which the State regulates apprenticeship programs and the employment of apprentices on public works projects.
>
> * * *
>
> In contrast to [*Boston Harbor*,] the State in this case did not establish the apprentice prevailing wage law specifically for the detention facility project and the

[3] Indeed, contrary to the Government's description of the D.C. Circuit's decision, that court did not find, as a factual matter, that the PLA ban was "designed to . . . 'ensur[e] the most effective use of [government] funds.'" Gov. Br. at 12. Instead, in rejecting our argument that the Government lacked any proprietary interest in federally assisted construction projects that the Government does not actually own or control, the Court of Appeals wrote that "the Government unquestionably is the proprietor of its own funds, and *when* it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." Pet. App. 11a (emphasis added). The D.C. Circuit's general observation regarding the interests of a "lender or benefactor" hardly qualifies as a holding that this particular Executive Order was intended to "ensure the most effective use of [government] funds."

> State was not motivated by management concerns when it adopted the apprentice prevailing wage law. The State's purpose in enacting and enforcing the apprentice prevailing wage law was to regulate apprenticeship programs and wages paid on public works projects. [190 F.3d at 1038.]

As we explained in our *certiorari* petition (at 16), the Ninth Circuit thus held that government procurement action that sets an across-the-board labor relations rule that governs employers and employees while they are doing work on government construction projects is classic government regulatory action, "subject to NLRA preemption [analysis]." 190 F.3d at 1038. And that holding is in the most direct conflict with the D.C. Circuit's holding here.

Nor does the Government's dismissal of the conflict we assert between the decision below and *Cardinal Towing v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999), and *Sprint Spectrum v. Mills*, 283 F.3d 404 (2d Cir. 2002)—on the theory that "although the[se] courts noted the narrow scope of the challenged requirements in finding them to be proprietary, the courts would not necessarily have held the requirement to be regulatory had they been applied more broadly," Gov. Br. at 12—withstand scrutiny. As we showed in the *certiorari* petition (at 18-19), the Fifth Circuit's *Cardinal Towing* proprietary/regulatory test—which the Second Circuit adopted in *Sprint Spectrum*—is not merely different from the D.C. Circuit's test, it is different in an outcome-determinative way—in a way that, when applied to Executive Order No. 13202, requires the conclusion that the Executive Order constitutes regulatory, not proprietary, action.

* * *

In short, all the points made in our *certiorari* petition stand, and those points call for this Court to grant the petition.

B. The second question our petition presents is whether, as we contend (and as the District Court held), Executive Order No. 13202 is a government procurement action that, under the NLRA's preemption principles, improperly intrudes into the exclusive labor relations regulatory scheme established by Congress. We noted that, in light of its ruling on the threshold proprietary/regulatory dichotomy issue, the D.C. Circuit did not reach this ultimate merits question, but that the following considerations militate in favor of its consideration by this Court: the question is a pure question of law that is closely related to the first question presented and that has great practical significance and large ramifications. Pet. at 26. And, we then went on to outline the arguments demonstrating that the Executive Order does improperly intrude into the field Congress occupied by the NLRA. *Id.* at 27-30.

The Government makes three points in its response, none of which is availing.

First, the Government asserts that

> if this Court were to grant *certiorari* and reverse on the first question presented in the petition . . . , the appropriate course [since the D.C. Circuit did not reach the second question] would be to remand the case to the court of appeals to consider whether, or how, NLRA preemption principles apply to the Executive Order. [Gov. Br. at 14.]

Certainly, in the run of cases, that would be the "appropriate" course. But it is not in any sense the required course, and for the reasons we stated in the *certiorari* petition—which the Government does not address, much less rebut—it is not the appropriate course in this case.

Second, the Government notes that "the D.C. Circuit held in *Chamber of Commerce* [*v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996)], that the doctrine of NLRA preemption articulated in [*Machinists*] *v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), . . . 'applies to

federal as well as state action,'" and argues that *Chamber of Commerce* is in error in "ignor[ing] the distinct origins of *Machinists* preemption as a restraint on state and local governments by operation of the Supremacy Clause." Gov. Br. at 14. It is, says the Government,

> particularly anomalous to conclude, as the court of appeals did in *Chamber of Commerce*, that action of the President that is authorized by Article II [of the Constitution] and the Procurement Act is invalid, on the theory that the action involves matters that the NLRA intends to leave unregulated by the National Labor Relations Board and that the Supremacy Clause requires to be unregulated by the States. [*Id.* at 15.]

The anomaly is, in fact, on the other side. As the Government notes in developing its argument, the *Machinists* preemption doctrine rests on the recognition that "in enacting the NLRA, 'Congress intended that the parties should have wide latitude in their negotiations, unrestricted by *any government power* to regulate the substantive solution of their differences." Gov. Br. at 15, *quoting NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960) (emphasis added). Given that congressional intent, what would be anomalous would be to recognize an independent procurement power in the Executive to superimpose its labor relations policies on the system of collective bargaining established by the NLRA.

As its third and final point, the Government claims that "the Executive Order does not violate *Machinists* preemption principles." Gov. Br. at 16. After noting our argument that the Order is an improper Executive regulation of collective bargaining in that "whereas the NLRA explicitly authorizes construction managers and construction unions to freely negotiate PLAs, the Executive Order negates that explicit authorization by prohibiting the[ir] negotiation," the Government states that the argument is "inconsistent with the reasoning of *Boston Harbor*." *Id.* But nothing the *Boston*

*Harbor* Court said or did even suggests that governments can regulate collective bargaining between construction managers, as employers in the construction industry, and construction unions by prohibiting those parties from negotiating a kind of collective bargaining agreement that the NLRA permits them to negotiate. And, the notion that government action that flatly prohibits negotiation of a particular kind of collective bargaining agreement that the NLRA permits is somehow more compatible with the NLRA's regulatory scheme than government action that indirectly affects the negotiation of agreements by regulating a particular "economic weapon" (*id.*) gets the *Machinists* principle exactly backwards.

* * *

We would be derelict if we limited ourselves to responding only to the substance of the Government's argument on the second question presented by the *certiorari* petition, and failed to note the implications of that argument. For what is most significant at this jurisdictional stage is that the Government takes the position that the Executive has a plenary procurement power to impose its labor relations policy on government contractors without any regard to the conflict between the Executive's policies and the labor relations policy stated in the NLRA. That expansive claim of power underscores the importance of the second question we present and the need for this Court to address and decide it.

## CONCLUSION

For the reasons stated in the *certiorari* petition and in this reply brief, the petition should be granted.

Respectfully submitted,

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